

If tangible personal property is transferred incident to sales of service, this will result in either Service Occupation Tax liability or Use Tax liability for the serviceman depending upon his activities. See 86 Ill. Adm. Code 140.101 through 140.109. (This is a PLR.)

July 7, 2006

Dear Xxxxx:

This letter is in response to your letter dated October 25, 2004, in which you request information and the supplemental information received by our office on December 13, 2005. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.tax.illinois.gov to review regulations, letter rulings and other types of information relevant to your inquiry.

Review of your request disclosed that all the information described in paragraphs 1 through 8 of Section 1200.110 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to ABC, for the issue or issues presented in this ruling, and is subject to the provisions of subsection (e) of Section 1200.110 governing expiration of Private Letter Rulings. Issuance of this ruling is conditioned upon the understanding that neither ABC, nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request. In your letter you have stated and made inquiry as follows:

FIRM respectfully requests a ruling on behalf of our client, ABC, regarding application of the Illinois Retailer's Occupation Tax ('ROT') and corresponding Use Tax ('UT'), and the Service Occupation Tax ('SOT') and corresponding Service Use Tax ('SUT') on the transactions described below.

This request outlines the facts surrounding ABC's activities in Illinois, states the applicable statutory provisions, and discusses our position relating to the application of the ROT, UT, SOT, and SUT to these transactions.

STATEMENT OF FACTS

ABC, a STATE corporation with offices in Illinois and throughout the country, performs property management services in Illinois for owners and occupiers of commercial real

estate in Illinois. ABC is currently remitting Use Tax in the State of Illinois under registration number #. For each client engagement, ABC operates under one of two types of management arrangements, as determined by marketplace conditions:

- **IC Engagement:** In an IC Engagement, ABC operates as an independent contractor under a Facilities Management Agreement. Unless expressly stated, ABC does not operate with express agency authority from the client in an IC Engagement.
- **Agency Engagement:** In an Agency Engagement, ABC acts as an agent for the client under an express grant of authority given in the Property Management Agreement entered into between ABC and the client.

This request relates to the manner in which Illinois ROT, UT, SOT and SUT apply to each type of property management engagement relative to the procurement of goods and services from third-party vendors necessary for the operation of the property being managed by ABC. A sample of each management agreement is included for review with this request.

In the normal course of a property management engagement, whether an IC Engagement or an Agency Engagement, ABC procures all goods and/or services from third-party vendors necessary to operate the properties being managed for a particular client. Examples of such goods and services include: landscaping services; washroom supplies; and elevator maintenance services. The goods and services provided by third-party vendors are provided directly to a specific client's property for immediate use on that property to satisfy an immediate need. The third-party provided goods are never held as inventory of ABC for use at a later time or for performing property management services for any of its other clients, and ABC never takes title to the goods.

ABC receives invoices for these goods and services from the third-party vendors, and presents the invoices to the subject client for approval. All invoices include applicable retail sales and use taxes. Once an invoice is approved, the client deposits funds into a segregated bank account, from which ABC is authorized to withdraw funds to pay the invoice, including all applicable retail sales and use taxes. It is agreed to by the third-party vendor and ABC that the vendor will only be paid from funds deposited by the client into the segregated bank account, and ABC does not pay the vendors using its own funds. It is further agreed between the third-party vendor and ABC that ABC will have no liability in the event of non-payment by the client.

For both IC Engagements and Agency Engagements, the third-party vendor determines the applicable tax due for each invoice, and adds that tax to the invoice. The tax is paid when the full amount of the invoice is paid from the segregated bank account, and the vendor remits all taxes as part of its usual monthly sales tax procedures. ABC's role is to oversee the payment of applicable taxes as part of the payment of vendor invoices from the segregated account. All taxes applicable to the goods and services provided by third-party vendors are collected and remitted by the vendors in the appropriate amount and time.¹

ABC does not charge or otherwise receive any sort of mark-up on the goods and services procured on behalf of its clients. ABC's value is added solely in the management of the client's property and the timely ascertainment of the need for

particular goods or services for the operation of that property. ABC receives no compensation from its clients based on its inventory distribution and maintenance services, which would be associated with a wholesaler or retailer in a traditional supply chain. Whether the property management engagement is an IC Engagement or an Agency Engagement, ABC's value is in the oversight, coordination, and procurement of vendor-provided goods and services needed for the particular property and particular client.

The only differentiating feature between IC Engagements and Agency Engagements is the way that a third-party vendor makes its contract. In an IC Engagement, the third-party vendor makes its contract directly with ABC. In an Agency Engagement due to the express agency ABC obtains from its client, the third-party vendor makes its contract with ABC as agent for ABC's client. All of the attributes summarized in the preceding paragraph are the same for both IC Engagements and Agency Engagements.

In return for its property management service, ABC is compensated through a monthly management fee, upon which ABC pays all applicable Illinois taxes.

RULING REQUEST

Whereas:

- All goods and services are provided directly to a specific client's property, not as inventory of ABC;
- Third-party vendors are paid only from funds placed in a segregated account by ABC's client, as per the express agreement with the third-party vendors;
- ABC does not charge its clients any mark-up on goods and services procured on the client's behalf; and
- All applicable retail sales and use taxes are paid on each invoice in an amount equal to what ABC would collect and remit if it was to issue a resale certificate, collect retail sales and use tax from its clients, and remit all collected taxes to the Illinois Department of Revenue.

Sales of goods and services by third-party vendors to ABC's clients, in which ABC acts as a procurement agent on behalf of its clients, are not sales for resale to ABC, and ABC is not required to pay ROT or SOT (or collect UT or SUT) on the transactions, regardless of whether ABC's agreement with its client constitutes an IC Engagement or an Agency Engagement.

DISCUSSION

The Illinois sales and use tax regime encompasses four separate taxes: the ROT; the UT; the SOT; and the SUT.²

- The ROT is imposed on persons engaged in the business of selling tangible personal property at retail, defined as any person who holds himself or herself out as being engaged (or who habitually engages) in selling tangible personal property at retail.³ The legal incidence of the ROT is on the retailer, who is responsible for remitting the tax to the state.⁴

- The UT, which complements the ROT, is imposed on the privilege of using, in Illinois, tangible personal property purchased anywhere at retail.⁵ To the extent the retailer is liable for the ROT, he may reimburse himself by collecting the UT collected from his customers.⁶
 - The SOT applies to all 'servicemen' on tangible personal property transferred as an incident of a sale of service.⁷ A 'serviceman' is defined as any person who transfers property as an incident to a sale of service.⁸
 - The SUT is imposed upon the privilege of using in Illinois any real or tangible personal property acquired as incident to the purchase of a service from a serviceman.⁹
1. The transactions, whereby ABC procures goods and services for direct supply to its clients by third-party vendors, constitute direct 'retail sales' and 'sales of service' by the third-party vendors to ABC's clients.

For ROT/UT purposes, a 'retail sale' is defined as any transfer, for valuable consideration, of the ownership of or title to tangible personal property to a purchaser for the purpose of use, and not for the purpose of resale in any form as tangible personal property, to the extent not first subjected to a use for which it was purchased.¹⁰ For SOT/SUT purposes, a 'sale of service' is defined as any transaction, except a retail sale of tangible personal property taxable under the ROT or UT, a sale of tangible personal property for the purpose of resale, or any sale or transfer of property specifically excepted.¹¹

In both IC Engagements and Agency Engagements, ABC procures goods and services on behalf of its clients. Goods and services are transferred directly to clients by third-party vendors. Clients are invoiced directly by third-party vendors through ABC, and all invoices include applicable UT and SUT charges. Clients are solely responsible for all payments due for goods and services provided by third-party vendors. Clients satisfy all invoices by transferring funds to a segregated bank account, from which ABC makes payment to the third-party vendors on behalf of the clients.

These transactions constitute direct retail sales and sales of services between the third-party vendors and ABC's clients.¹² As such, the third-party vendors, as required, remit applicable ROT and SOT on the transactions, and charge ABC's clients corresponding UT and SUT. Because ABC never takes title to,¹³ nor possession of, any goods transferred, and merely acts as a procurement agent in the transactions, ABC is not required to remit ROT or SOT on the transactions.

2. The transactions, whereby ABC procures goods and services for direct supply to its clients by third-party vendors, are not sales to ABC for resale to its clients.

The terms 'retail sale' and 'sale of service' do not include transactions that constitute resale transactions.¹⁴ Accordingly, sales of tangible personal property for resale are exempt from the ROT/UT and the SOT/SUT. In order to qualify as a 'resale transaction,' a sale must be for the purpose of resale, in any form, the goods transferred must not be used prior to resale, and the purchaser must present a valid resale certificate to the vendor.¹⁵ The purchaser in a sale for resale transaction is required to remit ROT and/or SOT on the subject property in the subsequent retail sale/sale of service.

The transactions between the third-party vendors and ABC's clients do not constitute sales for resale to ABC, followed by retail sales by ABC to its clients. Rather, the transactions are direct retail sales (or sales of service) to the clients by the third-party vendors. The third-party vendors pay all applicable ROT/SOT and include the appropriate UT/SUT on invoices to ABC's clients. ABC never takes title or possession of the goods provided, does not mark up the price of goods and services procured, and pays for all goods and services using client funds. Accordingly, because the transactions are properly characterized as direct retail sales, ABC does not treat the transactions as resales for administration or tax purposes.

CONCLUSION

In sum, ABC should not be required to remit ROT or SOT (or to collect UT or SUT) on transactions where it acts as the procurement agent for its clients. Such transactions constitute direct retail sales and direct sales of services by the third-party vendors to ABC's clients. All applicable ROT and SOT is paid by the third-party vendors on the transactions, and the appropriate UT and SUT is included on invoices paid by ABC on behalf of its clients, using client funds. The transactions do not constitute sales to ABC for resale. As such, ABC does not issue, and should not be required to issue resale certificates on the transactions.

In addition, from a policy standpoint, accuracy and efficiency are best served when vendors determine the applicable sales and use taxes on their billings, and collect and remit those taxes. If ABC is required to act as a reseller, it must undertake to register to collect sales tax, be authorized to issue resale certificates, undertake the administration of correctly determining sales tax on thousands of vendor invoices, and properly remit the tax due on the provision of goods and services by third-party vendors directly to clients. The administrative burden of such activity would be substantial, the accuracy of the assessments would invariably be lessened compared to vendor determinations of sales tax on their own billings in accord with their normal practices, and there ultimately would be no change in the amount required to be remitted to the state, as ABC does not charge a mark-up on any goods or services procured on behalf of its clients.

For these reasons, ABC respectfully requests that the Illinois Department of Revenue confirm that because all applicable transaction taxes are paid on the transactions in which ABC serves as procurement agent for its clients, ABC is in compliance with the relevant Illinois sales and use tax laws, and ABC will not be subject to any assessment or penalty for failure to comply with said laws by administering the sales and use tax payments in the above described manner for both IC Engagements and Agency Engagements.

If you have any questions, please do not hesitate to contact me¹⁶.

DEPARTMENT'S RESPONSE:

Illinois Retailers' Occupation and Use Taxes do not apply to sales of service that do not involve the transfer of tangible personal property to customers. However, if tangible personal property is transferred incident to sales of service, this will result in either Service Occupation Tax liability or Use Tax liability for the serviceman depending upon his activities. For general information please see 86 Ill. Adm. Code 140.101 through 140.109 regarding sales of service and the Service Occupation Tax.

Service Occupation Tax or Use Tax is incurred on all transactions wherein there is a transfer of tangible personal property between a serviceman and the service customer.

Your Private Letter ruling request indicates that ABC markets its services using two separate agreements – an Agency Agreement and an Independent Contractor Agreement. The Department is declining to provide a ruling on the Independent Contractor Agreement. Transactions involving independent contractor services are generally fact intensive based on the actual relationship between the parties and the actual services provided, therefore, we feel the Department's auditors are in the best position to determine the nature of the transaction after a careful examination of each transaction and the associated relationship between the parties. It is important to note that, in general, an independent contractor would incur Service Occupation Tax or Use Tax liability in a service situation.

In regards to the services provided under the Agency Agreement, the documentation submitted with your private letter-ruling request indicates there is no transfer of tangible personal property between ABC, as property manager, and its client -- the service customer. Therefore, AB does not incur Retailers' Occupation Tax or Use Tax liability in these transactions under the Agency Agreement when it is acting as property manager for the service customer.

This ruling is premised on the fact that ABC in the performance of its duties as property manager under the Agency Agreement does not take title nor ownership interest in any tangible personal property secured on behalf of its service customers. In addition, it is our understanding that the funds for such purchases are channeled through a segregated bank account owned and operated entirely by ABC's service customer (the "Client"). The information provided indicates that ABC acts as an intermediary and is paid a commission for its services as property manager for the procurement of goods and services such as landscaping, washroom supplies and elevator maintenance services, however, neither ABC, nor its agents, physically perform any of the services for the service customer. Further, the Department's opinion is based on the fact that ABC does not charge a mark-up on the goods and services procured on behalf of its client.

As long as this is the case, we agree that the transactions under the Agency Agreement are between the service customer and the third-party vendors, therefore, Retailers' Occupation Tax and Use Tax liability is not incurred by ABC, as property manager. Please note, the channeling of funds through the segregated bank account to pay for services rendered to property owned by the service customer, managed by the ABC as property manager, does not change the Retailers' Occupation Tax liabilities of the third party vendors, or the Use Tax obligations of the service customer.

The factual representations upon which this ruling is based are subject to review by the Department during the course of any audit, investigation, or hearing and this ruling shall bind the Department only if the factual representations recited in this ruling are correct and complete. This Private Letter Ruling is revoked and will cease to bind the Department 10 years after the date of this letter under the provisions of 2 Ill. Adm. Code 1200.110(e) or earlier if there is a pertinent change in statutory law, case law, rules or in the factual representations recited in this ruling.

I hope this information is helpful. If you have further questions concerning this Private Letter ruling, you may contact me at 782-2844. If you have further questions related to the Illinois sales tax laws, please visit our website at www.tax.illinois.gov or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Edwin E. Boggess
Associate Counsel

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¹ In instances where the third-party vendor does not have nexus with Illinois sufficient to require collection of applicable use taxes, the clients self-assess and remit the tax directly to the Department.

² 35 ILCS 120/14, 105/1, 115/1, 110/1.

³ 35 ILCS 120/2.

⁴ 35 ILCS 120/1, 120/2.

⁵ 35 ILCS 105/3;

⁶ *Turner v. Wright*, 142 N.E.2d 86 (Ill. 1957); 86 Ill. Admin. Code § 130.101(d).

⁷ 35 ILCS 115/3.

⁸ *Id.*

⁹ 35 ILCS 110/3.

¹⁰ 86 Ill. Admin. Code § 150.201(d).

¹¹ 86 Ill. Admin. Code §140.201(f).

¹² In the transactions, ABC's clients, and not ABC, constitute 'purchasers.' For purposes of the ROT and the UT, 'purchaser' means anyone who, through a sale at retail, acquires the ownership of or title to tangible personal property for a valuable consideration. 35 ILCS 105/2,120/1; 86 Ill Admin. Code §150.201. For purposes of the SOT and SUT, 'purchaser' means any person who, through a sale of service, acquires the ownership of or title to property. 35 ILCS 110/2; 86 Ill. Admin. Code §160.105.

¹³ Illinois courts historically have focused on the transfer of title as indicative that a retail sale has taken place. *See Weber-Stephen Products, Inc; v. Department of Revenue*, 324 Ill. App. 3d 893, 899 (2001).

¹⁴ 35 ILCS 105/2, 120/1, 110/2, 115/2.

¹⁵ *See* 86 Ill. Adm. Code §130.210.